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BOOK REVIEWS

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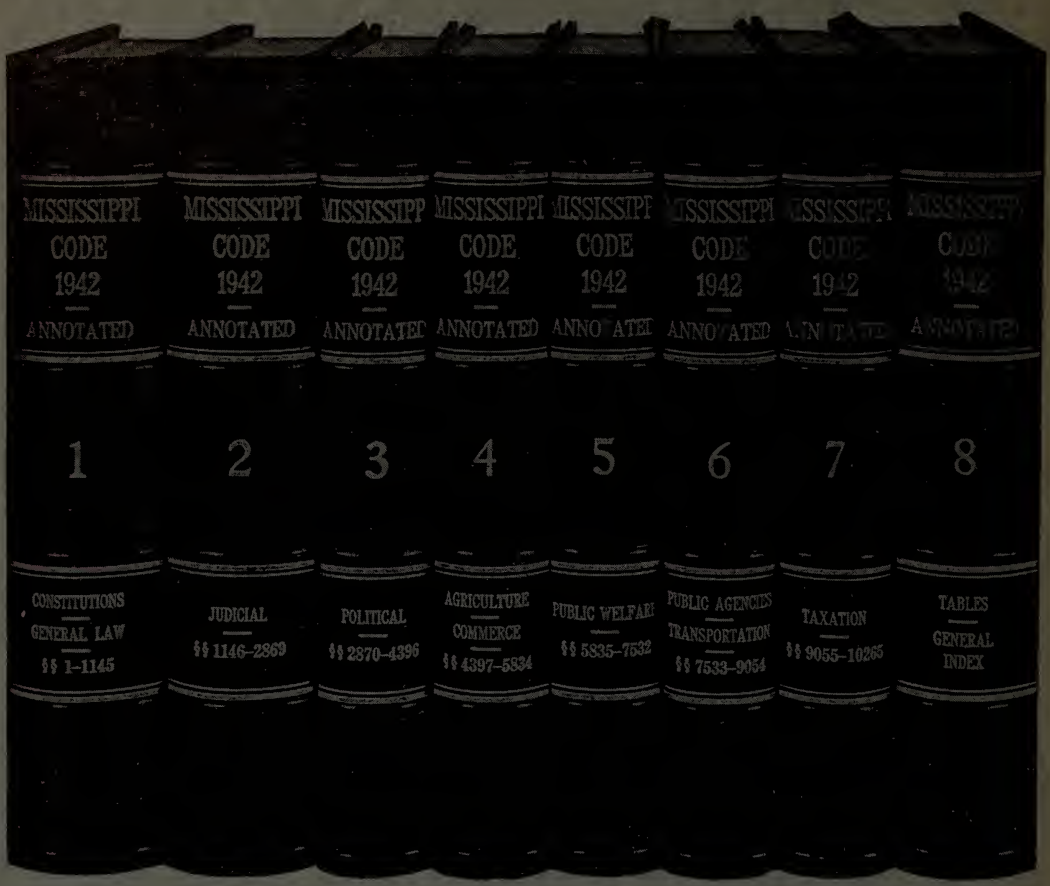

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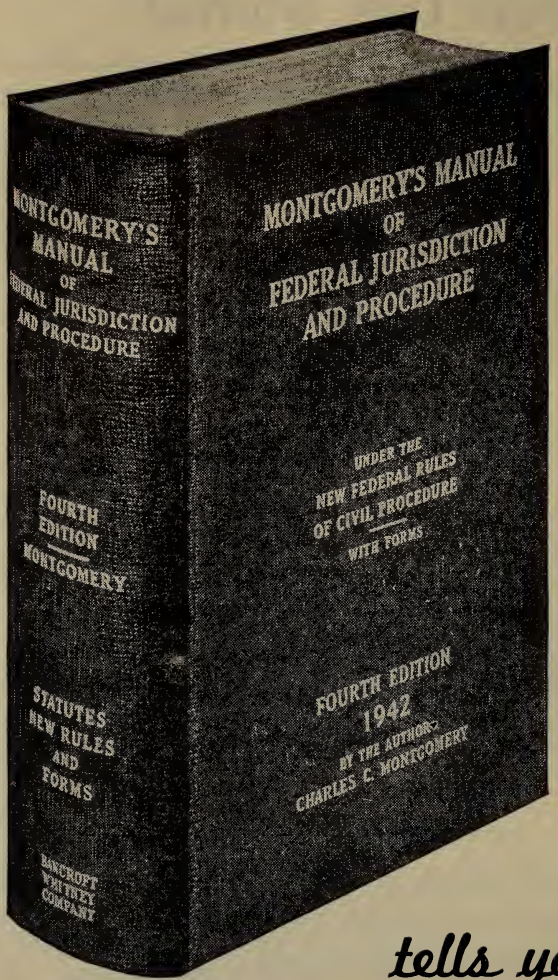
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PRESUMPTIONS: THEIR USE AND ABUSE*

Julian P. Alexander†

To say that it is a presumption to seek to add to the subject anything but further confusion, is both to state a deplorable truth and to suggest by an equally deplorable play upon the word itself the source of most of the confusion. A human tendency to adopt existing moulds rather than recast thought in newer forms, casts the innovator in the role of a venturesome crusader. Unless he brings to his task a degree of reason sufficient to outweigh a normal aversion to change, this role is unenviable.

Judges and text writers have bewailed the confusion as to the nature and use of presumptions. Even Professor Thayer, who above all others has helped to dissipate the fogs which hover about the subject, speaks of attempts to rescue it from obscurity as "an unprofitable and monstrous task."[1] Ambiguity in the term "presumption" has already been intimated. Yet when sought to be restricted to a technical legal concept, it is subdivided, re-defined and classified with academic refinements which uselessly expend valuable mental resources. They would better be directed toward the demolition of those frail structures that have been loosely erected, tier upon tier, upon what was at the outset a simple and solid foundation.

Unless presumptions can be properly defined, it is a futile didactic exercise to classify them.[2]

In a fundamental sense, all presumptions are presumptions of fact.[3] They are but means to an end, and that end is the adducing of facts or the discovery of truth. They are not evidence but devices by which evidence is supplied.[4] Truth is the goal of all evidence. Hence, if the pre-

*This is the first of two articles by the author on the subject of presumptions. The second article, *Presumptions in Criminal Cases*, will appear in the May issue.

†Associate Justice, Supreme Court of Mississippi.

[1]THAYER, A PRELIMINARY TREATISE ON EVIDENCE (1898) 313.

[2]*Cf.* BEST, EVIDENCE (1908) 310 n.

[3]*Id.* at 284, 285, 304, 310.

[4]9 WIGMORE, EVIDENCE (3d ed. 1940) § 2511, refuting Greenleaf. "A rule of evidence," BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 636; "a rule of substantive law," THAYER, *op. cit. supra* note 1, at 316; forms of circumstantial evidence, 1 WIGMORE, § 25, *supra;* they are not evidence. HINTON, CASES ON EVIDENCE (1930) 79; THAYER, *op. cit. supra* note 1, at 548; McBaine, *Presumptions: Are They Evidence?* (1938) 26 CALIF. L. REV. 519; 31 C. J. S., EVIDENCE, § 115; "Expedients for the common good," Jeff v. State, 39 Miss. 593, 602 (1860); a rule of argument, 21

sumption does not invariably supply some fact, it is no presumption. Again, all are presumptions of law for they are recognized and applied as legal rules by the courts. Yet, since they do not all owe their probative force to positive law, it is logical to consider all presumptions as inferences of fact.[5]

The reason for their invention is distinct from their purpose. All issues are to be resolved according to the truth, and even as evidence is given to disclose truth as its end, so presumptions were devised as a means to supply evidence. We speak of direct and circumstantial evidence as if they were distinct in genus. The difference is only one of degree. It is a postulate of some philosophers that truth is a mere abstraction and that men never positively know anything. It is simple enough to accept *A's* testimony that he saw *B* shoot and kill *C*. Yet it is possible that it was the double of *A* or *B* whom he saw; that *B* was killed by shock from the firing of the gun; or that another gun was fired simultaneously by an unknown party. Human senses are capable of being deceived. In every so-called positive statement, there is a thread of inference which binds the fagots of belief together.

It is true, therefore, that presumptions are merely accepted patterns of circumstantial evidence, justified by experience and sustained by logic and reason, and above all, in their technical sense standardized as accepted formulas for justifying the acceptance of a logically related fact from the proof of another fact. The reasons for casting these devices into moulds include the policy of saving time and expense, in which aspect they are mere variants of judicial notice; or to surmount a disproportionate difficulty of detailed proof, or because the ultimate fact is peculiarly in the possession or knowledge of the adverse party. Public policy and the exigencies of the social order explain their invention. Yet it is not our purpose to explain or justify them but to discuss the nature and extent of their

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R. C. L., EVIDENCE, § 141; a rule of law that attaches definite probative value to specific facts, 20 AM. JUR., EVIDENCE, § 158 (selected from "A plethora of definitions"); circumstantial evidence, 1 WIGMORE, § 25, *supra;* BEST, *op. cit. supra* note 2, at 280; presumptive evidence, BEST, *id.* at 280; there must be a rational connection between the bases and the fact inferred, Tot. v. United States (decided U. S. Sup. Ct., June 7, 1944); a matter of evidence, Wilson v. State, 8 So. (2d) 422, 441 (Ala. 1942); "have the force of evidence," GRIFFITH, CHANCERY PRACTICE (1925) 634, citing Smith v. Kirkland, 89 Miss. 647, 42 So. 285 (1906); "a principle of law by which . . . . facts not established by positive evidence are inferred from circumstances," MATTHEWS, PRESUMPTIVE EVIDENCE (1830) 1; closely allied to judicial notice, THAYER, *op. cit. supra* note 1, at 314; BOHLEN, *op. cit. supra* at 636; A. L. I., MODEL CODE OF EVIDENCE (1942) Rule 702. I favor the oldest of these definitions, that by Matthews, *supra.* My own contribution to the "plethora" is that a presumption is a rebuttable assumption (whether established by judicial rule or statute) that the evidence adduced is invariably accepted as sufficient to establish prima facie some *factum probandum.*

[5]BEST, *op. cit. supra* note 3, at 285.

use.[6] Let it suffice that the term presumption is unfortunate. Its safest definition is a compelled inference. As such, it is a rule of law. It is a judicial assumption of the existence of fact *C* from the proof of facts *A* and *B*. Yet *C* is not the presumption, nor yet is *A* or *B*. In the simple formula, $A + B = C$, the so-called presumption is encysted in the equality sign. Therefore, there are no conflicting presumptions except as there is conflicting evidence.[7]

Presumptions are inferences, but the latter is the broader term. Not all inferences are legal presumptions because only those which have been accepted as practical and procedural necessities and which are adopted as safe and justifiable generalities by the courts are properly so.[8] Unless therefore the finding of fact *C*, by the establishment of the bases *A* and *B*, *must* be supported by the judges as a standardized procedure, it remains within the undefined domain of circumstantial evidence and stands

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[6]It is futile to quibble whether they are rules of law, of procedure, or of evidence. They are all of these. They are accepted by judges or established by statutes as legal rules; they affect procedure by shifting the burden of proceeding; they are rules for the convenient adduction of evidence. McKELVEY, LAW OF EVIDENCE (4th ed. 1932) 120.

[7]9 WIGMORE, *op. cit. supra* note 4, § 2493; A. L. I., MODEL CODE OF EVIDENCE (1942) Rule 704, comment (b). It is interesting that BEST, *op. cit. supra* note 3, at 582, in illustrating "conflicting presumptions" discusses alleged conflicts with the so-called presumption of innocence, which is not a genuine presumption. For an interesting discussion, see *Hemingway v. State,* 68 Miss. 371, 417 (1890). See note 8, *infra.*

[8]Thus, many so-called presumptions are mere informal, though logical, inferences. See McKELVEY, *op. cit. supra* note 6 at 83. The term is constantly employed in judicial opinions where the Court is discussing the weight of the evidence of justifying a failure to adduce positive proof. Many are mere assumptions of that which is usual, normal or moral. For example: common sense, Yazoo City Transportation Co. v. Smith, 78 Miss. 140, 147 (1900); sanity, knowledge of the law, conformity to law, innocence, intent to cause probable consequences, or against change. These are spurious presumptions. McKELVEY, *supra* at 103. Some are so-called to keep alive certain fictions of substantive law. For example, the presumption of a lost grant in title by adverse possession; presumption of payment as inherent in the Statute of Limitations. (It would seem that here even the great Thayer nodded, *op. cit. supra* note 1 at 539). Such statutes are mere adjective rules affecting the remedy; the estoppel of a tenant to dispute his landlord's title (See THAYER, *id.* at 540); the presumption of prejudice when jury separates without authority. (This is but the imposition of a penalty for violating the rule that they must be kept intact. It is but a device to compel conformity to due process); the invocation of the attractive nuisance doctrine by an assumption that all persons know the propensity of children to play upon lumber piles. This would seem to be merely a "presumption" that all persons know the laws of human nature. Spengler v. Williams, 67 Miss. 1 (1889). A fact assumed need not be proved. A fact presumed is one which is held to have been proved, albeit by inference. Even Judge Cardozo, most meticulous of exact writers, in discussing the restatement of the law, predicted that "No doubt there will be a strong presumption in favor of the principle or precept that can vouch such sponsors to its aid." CARDOZO, THE GROWTH OF THE LAW (1924) 10. The non-technical sense is frequently used in opinions. The so-called presumption against a party failing to call a witness should be kept in its place as a mere prejudicial factor. See note 31, *infra.*

or falls by the laws of logical relevancy.[9] In this sense, most presumptions are phases of judicial notice. The constant use of the term in opinions has led to the error of borrowing language therefrom to establish fixed rules. As most often so used, what is meant is no more than the Court, in weighing the evidence in the record, draws certain relevant and accepted inferences. So employed, a "presumption" is but a test of the relevancy of circumstantial evidence. Yet such inferences are primarily for the jury. The Court is concerned with the question whether the inferred facts are sufficient to make a prima facie case or to change a verdict.

By way of dismissing the classification of presumptions as not relevant to our present inquiry, it may be pointed out that as to the method of their establishment, they result from either statutes or judicial acceptance and pronouncement. As to their inherent nature, they are either logical as being in accord with observation and experience, or arbitrary as being adopted *ad convenientum.* I should decry subdivisions into those which are: 1. conclusive, or 2. rebuttable. If the inference sought is conclusive, it is final and compulsory and becomes a substantive rule of law. It is no longer a tentative assumption open to reason. That the rule originated in an assumption based upon experience or is purely arbitrary[10] is of less importance than its attained status as a legal rule. For example, title by prescription is built about the core of a presumption of a lost grant, yet an adverse, continuous and hostile possession for ten years, though logically relevant to an assumption of abandonment by the prior owner of a grant, bestows title as a fixed statutory rule of property.[11]

So the assumption, justified by experience, that an infant under seven years of age is incapable of forming a criminal intent is a conclusive

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[9]McKelvey, *op. cit. supra* note 6 at 86. It is a "mandatory deduction," while a mere inference (not adopted as a rule) is a "permissible deduction"; 20 Am. Jur., Evidence, § 162; Thayer, *op. cit. supra* note 1, at 313, n. 1, quoting Stephen; "When the basic fact exists the existence of another fact must be assumed," A. L. I., Model Code of Evidence (1942) Rule 701. See also *id.*, Rule 704. See McCormick, *Charges on Presumptions and Burden of Proof* (1927) 5 N. C. Law Rev. 291. All presumptions are compulsory; inferences are permissive. The presumption which is mandatory upon the judge loses its identity as a presumption when it reaches the jury. The inherent inference remains and is permissive.

[10]Most presumptions involve logical inferences. There are in strictness no arbitrary presumptions. If arbitrary in the sense that they are conclusive and irrebuttable, they are substantive rules and cease to be presumptions. Such assumptions as sanity or knowledge of law or of innocence are arbitrary, but they are reasonable devices for fixing the burden of proof. As to how far the legislature may disregard logical relevancy, see *Tot. v. United States,* cited in note 4 *supra;* 20 Am. Jur., Evidence, § 159, also 42 Harv. Law Rev. 1076; 43 *id.* 100; 48 *id.* 102; 38 Yale L. J. 1145. Pure statutory conclusive presumptions are rare. An example is found in Miss. Code Ann. (1942) § 5094.

[11]Itawamba County v. Sheffield, — Miss. —, 13 So. (2d) 649 (1943). See 9 Wigmore, *op. cit. supra* note 4, § 2492.

presumption, but its status as a rule of law needs no genealogical examination showing that one of its ancestors was a presumption.

This fortifies the conclusion that all true presumptions are rebuttable. More properly, they are tentative assumptions. Although they *may* be rebutted, initially they *must* be imposed. Whether the inference is one required by statute or judicial rule, its purpose is to make legally relevant such facts as are incapable of exact proof or inconvenient as being in possession of the opposite party or desirable as a social or procedural necessity. It has not at all added to clarification that there has been continued dispute whether its function is to do more than establish prima facie some *factum probandum*.[12] It may serve to make out a complete prima facie case if *C* is the ultimate basis of liability instead of a mere related fact.

I propose to emphasize that while presumptions are of fact, they are, more importantly, legal rules and therefore belong solely to the courts. Since they serve to establish facts, prima facie, they are all rebuttable. Since, again, they are rules of law, the judge must apply them in fixing the burden of going forward. Further, inasmuch as they are designed to supply facts not directly testified to, when such facts are directly testified to by either party, there is no need for the presumption and it vanishes.[13] Therefore it would seem that only in uncritical minds does this device accomplish more than shift the burden of proof.[14] To say that it makes a prima facie case (upon the point involved) is merely to state the truism differently.

Much of the confusion has come from investing the word with an inherent quality of its own as having evidential weight over and above that of the facts it artificially adduces. A presumption should not be a more complicated device than a simple shoe-horn which, when it has seemed to put a procedural shoe upon the other foot, may be laid aside.[15] Our chief purpose therefore is to inveigh against its use in instructions.

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[12]Presumptions do not necessarily make out a complete prima facie case. They may serve only to establish some relevant element. The use of the term "prima facie presumption," Southern Bell Tel. & Tel. Co. v. Quick, 167 Miss. 438, 452, 149 So. 107, 110 (1933), is inapt, being mere tautology. All presumptions establish facts prima facie. Indeed there is no such thing as prima facie evidence. The expression, however, is too well established to be shaken and may be harmless as an idiom. If the evidence is supplied by a presumption, it may make a *prima facie case*. If it is adduced directly, it does as much.

[13]Yazoo & M. V. R. R. v. Green, 167 Miss. 137, 147 So. 333 (1933). See note 48, *infra*, for further discussion of this case. Ample support for the textual statement is found in 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE (1911) § 1095.

[14]Or when used defensively to meet the burden.

[15]After bewailing the confusion attendant upon attempts to classify presumptions, the American Law Institute in its Model Code of Evidence concluded, "A simple solution must be sought even though it may not be as rational as a complicated one." *Id.* at 228. The writer hereof aspires to the task of submitting a solution that is rational because it is simple.

Presumptions Are Only For Judges

If there be such a thing as a conclusive presumption it means $A + B$ *must* equal C, and therefore the judge and the jury have no function except to find the bases A and B. Since presumptions are legal rules, they must be honored and enforced by the judge. He must find that tentatively $A + B = C$.[16] The factors being rebuttable, the opposing party is privileged to show either: 1. that either A or B does not exist, or 2. that C did not result. He must undermine the presumption by destroying its bases.[17] Thus he destroys the prima facie case, even as he may rebut evidence directly adduced without aid of the device. If he attack the finding, C, successfully, he has met the burden which the presumption placed upon him. There is no more reason why the presumption should exist after any of its factors has been destroyed or negatived, than if the opponent had sought to prove C directly without the short cut of a presumption.

If the jury *must* find C, then the Court will see to it that it does so, and to this end will peremptorily so instruct it. If it *may* find C, then it should be left free to do so uninfluenced by the judges' gratuituous hints that A plus B usually or properly should equal C. A jury should never be instructed that they "may" find one fact from the proof of another fact.[18]

Although our Court has throughout the years repeated the truth that when the facts are shown the presumption disappears,[19] the mists which linger about the function of presumptions remain undissipated. Despite lip-service to the principle that when the facts come in the door, the presumption flies out the window, it has been systematically readmitted through the side-door of instructions. Let us take some of the more troublesome applications of this solecism.

The Prima Facie Statute[20]

In substance, the statute provides that proof of injury by the run-

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[16]See note 9 *supra.*

[17]Although the presumption must fall when its bases are destroyed, yet the jury are aware of no rule that $A + B$ must equal C. They may find that $A + B$ does or does not equal C according to ordinary deductive processes and according to the extent that the existence of A or of B is brought into question.

[18]See Dickson v. Moody, 2 S. & M. 17 (Miss. 1843), where it was held error to charge that one fact may be presumed from proof of another. Alexander, *The State Also is Entitled to a Fair Trial* (1940) 12 Miss. L. J. 265, 292. Too little attention has been paid to the language of *Cheatham v. State,* 67 Miss. 335 (1889), where it was sanely observed that the admission of evidence attests its competency and the jury may consider all evidence before them. Additional impetus was given thereto in *Hemingway v. State,* 68 Miss. 371, 421 (1890), but its force seems to be spent.

[19]The cases are too numerous to list. Typical is *Billingsley v. Illinois C. R. R.,* 100 Miss. 612, 56 So. 790 (1911).

[20]Miss. Code Ann. (1942) § 1741.

ning of a train, and so forth, is prima facie[21] evidence of the want of reasonable skill and care, *i. e.*—of negligence. Whether the negligence, *C*, is ordinarily the product of *A* (injury) plus *B* (running of the train), or whether it is justified as compelling the production of evidence by him in whose possession it (usually) is to be found, it is material here only that proof of *A* and *B* will compel the judge to hold that *C* is sufficiently proved[22] either: 1. to justify and compel the jury to find negligence by a peremptory instruction, or 2. to require the defendant to disprove *C* (negligence).[23]

The history of judicial interpretation of this presumption illustrates how lenses, designed to improve vision, may by alternate exposure to the blowing of hot and cold become beclouded. It is found that early in the history of the statute, it was conceded that the presumption compelled the defendant to disprove the fact *C* (negligence) by evidence or the Court would find it from *A* and *B*. It was conceded that the presumption made a prima facie case and that this shifted the burden of procedure to the defendant. But the presumption was allowed to remain throughout the case and left free to intrude itself upon the jury as if it were not only a means to help the plaintiff shift his burden but became part of the burden itself. It was in effect allowed to shift the initial burden of persuasion. The defendant was required to "exonerate" itself to show "exculpatory facts."[24]

Thus the presumption was allowed to place a burden of proof upon the scales but to retain the weight of its own hand thereon. The Court was troubled by the dilemma as to what to do with the presumption once it had bestirred the defendant to adduce independent proof upon the issue of negligence. If there were no proof offered, it was simple enough to obey the mandate of the presumption and direct a verdict for plaintiff. On the other hand, if the defendant overwhelmingly established its due care, it was equally simple to direct a verdict in its favor. But in those cases where the Court was in doubt whether the defendant had "exonerated" itself, it became confused. It was felt that two alternatives were presented: 1. if the defendant had shown due care, then there was brought

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[21]See conclusion to note 12 *supra*.

[22]It may be here stated that the evidence supplied by a presumption is of necessity proof by a preponderance in civil cases, and beyond a reasonable doubt in criminal cases, else a directed verdict for defendant would follow.

[23]To what degree this disproof must attain is discussed *infra*, notes 53, 54.

[24]An excellent discussion of this statute was prepared by Judge W. W. Venable: *Mississippi's Prima Facie Statute* (1930) 2 Miss. L. J. 384. A year later many expressed doubts were dissipated in the *Walden* case. See note 28 *infra*, and accompanying text. Since writing the foregoing text in which crude adaptation of St. Paul's phrase is ventured, it has been an interesting discovery that in *Lamar v. State*, 63 Miss. 265, 272 (1885), the presumption is indeed described as "swallowed" up in the whole evidence. This case has an enlightening discussion of the use of the presumption in instructions.

to pass the saying that had been written many times that the presumption is swallowed up in the proof;[25] 2. if the Court felt that the jury could not find that the defendant had exonerated itself, then this meant in effect that there was no evidence[26] and therefore the plaintiff was entitled to invoke the presumption and the jury would so apply it. This meant no more nor less than sending out a tired and confused jury with the shoe-horn and the admonition that if they needed it they could shift the shoe from foot to foot, but if they did not, they could simply untie the knots and adjust the matter the hard way. Moreover, if the scales were equalized, they may place the shoe-horn itself thereon. Such course, borrowing some of the material of our discussion, invariably made a prima facie case in favor of the employment of the timesaving leverage of the handy device.

The history of the struggle with the statute has been elsewhere shown.[27] The oscillations incident to the impulses respectively to draw out the presumption when the facts were shown, and to invest it with an inherent probative force finally came to rest in *New Orleans & G. N. Railroad v. Walden,*[28] where the Court held that when rebutting facts were adduced, the presumption not only vanished from the case but also from the instructions. Two of the judges clung tenaciously in their dissent to ancient landmarks. The majority found the landmarks had been placed too far over upon the defendant's premises. This enlightened view was adhered to shortly thereafter in *Natchez Bottling Company v. Watson,*[29] applying the motor vehicle prima facie statute, and reinforced with emphatic reasoning in *Louisville & N. R. R. v. Cuevas.*[30] However, enough fog remains to justify occasional warnings.

The Presumption From Failure To Call Witness

If A is a witness to a crime or accident or document and the party B fails without excuse or explanation to call him as a witness, it would be a logical inference that *A's* testimony would be adverse to B. It has sufficient material from which to fashion a logical inference. It is not, however, adapted to a formal presumption. In the first place, it is used against instead of in favor of the party. It does not make a prima facie case but tends to defeat it. Adapted to the simple formula above, it would be represented as follows: $A + (-B) = C$. Nor is C a definite factor. The most that can be said is that A (having available an eye-witness or) $+ (-B)$ (failure to call) $= C$ (an inference generally unfavorable). It does not produce any definite result. Presumptions are devised to adduce

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[25]The favored language was "vanishes" or "disappears" or "yields to facts."

[26]*Cf.* People v. Galbo, 218 N. Y. 283, 112 N. E. 1041, 1045 (1916): "Insufficient evidence is . . . no evidence."

[27]See note 24 *supra.*

[28]160 Miss. 102, 133 So. 241 (1931).

[29]160 Miss. 173, 133 So. 677 (1931).

[30]162 Miss. 521, 524, 139 So. 397, 398 (1932).

facts. What is here the fact *C*? Not only is its character vague but its weight is dependent upon many factors: the kinship of the witness, cumulative effect of proposed testimony, extent of availability, probable extent of witness' knowledge, validity of excuse for failure, or relevancy.

Therefore, the most the courts could do was to infer that such absent witness' testimony would be generally unfavorable. As a logical inference it is valid; as a basis of argument or decision, it is relevant; as a presumption, it is incongruous. We should be guilty of disputing about mere words if it were not true that our Court has not only dignified it as a presumption but has given it the freedom of the jury room, with the blessing and sponsorship of the trial judge. A brief history of the phenomenon may not be out of place.

An early case is *Bunckley v. Jones*.[31] The complainant sought cancellation of certain conveyances as clouds upon his alleged title. It was testified that complainant's title was derived from a deed, which, although purporting to be to complainant, was in fact made to his father. Neither complainant nor his father was called as a witness. The Court said: "We are at liberty to presume that if he had been produced as a witness by appellant, his evidence would have been adverse to appellant." In other words, the Court, in weighing the testimony with a view to adjudging the reasonableness of the chancellor's findings, was free to assume that the testimony of complainant's father would not help complainant's case. This is logical and consists with normal experience. But is the word "presume" used in a popular sense or as the verbal equivalent of the noun "presumption"? If a presumption, what evidence does it adduce? Causes must be tried and issues resolved by evidence. The "presumption" here did no more than cast a bad light about complainant. Properly analyzed, the inference is merely negative and operates only to give force and credibility to the positive testimony of the opposing witness. His was the only controlling evidence. If uncontradicted by denial or inconsistent circumstances, it was entitled to credence. It was this evidence that resolved the issue. Complainant, faced with the burden of rebutting this testimony, could either adduce a contradiction or stand in default. Had his father not been available as a witness, the result should have been the same. The withholding of his testimony was not positive evidence but lent credence to the positive testimony of the witness. This sort of "presumption" seems merely to weaken or to strengthen positive evidence. The case being in chancery, the use of an instruction to the jury was not involved.

In *Anderson v. Cumberland Telephone and Telegraph Company*,[32] the Court used the following language: "The failure to present a witness who can be had, and who is presumed to be friendly to defendant, and

[31] 79 Miss. 1, 29 So. 1000 (1901).
[32] 86 Miss. 341, 38 So. 786 (1905).

who knows exculpatory facts if anyone does, raises a strong presumption that such facts do not exist." A peremptory instruction had been granted defendant, evidently upon the theory that the negligence of plaintiff's decedent, (hereafter called plaintiff) caused his death. The testimony showed that the defendant's superintendent, Potter, had directed plaintiff to climb a telephone pole and string a wire across a street. Plaintiff was dragged from the pole when the wire became entangled with a passing horse. The issue was whether plaintiff was directed by Potter to climb the pole. The plaintiff's testimony showed the affirmative. The so-called presumption did not establish his case nor help to give it prima facie force. The failure to call Potter, by discounting defendant's testimony that Potter had told plaintiff not to climb poles, did not itself furnish evidence; it merely colored evidence otherwise adduced.

It is well here to say that most of the confusion upon this subject stems from discussions in opinions whereby the Court is justifying its appraisal of the testimony with a view to adjudging whether a verdict is against or in accord with the evidence. For example, in the above case the Court employed the following expressions: "It might fairly and reasonably be inferred that Potter understood the situation," and again, "It seems to us that there is a strong presumption of fact that the boy . . . . ascended the pole under his direction." This, however, is not the stuff of which legal presumptions are made. They are but observations upon the weight to be given other testimony. Plaintiff did not and could not prove by such presumption that the decedent was directed to climb the pole nor that Potter understood the situation. The former was sought to be proved by direct testimony. The latter may properly be integrated into the formula as follows: *A* (Decedent is seen upon the pole with coil of wire) + *B* (Potter waved his hand to decedent and shouted something to him while he was upon the pole) = *C* (Potter knew he was upon the pole). Potter's failure to testify created no presumption that he knew decedent was there, but it invigorated the inescapable inference *C* deducible from *A* and *B*.

Further illustration of the ineptitude of labeling this circumstance as a presumption is seen in *Southern Bell Telephone and Telegraph Company v. Quick*.[33] The telephone manager was present at the trial but was not called to the stand. The Court said "The failure . . . . to present this witness who was present and friendly to it who knew exculpatory facts, if any one did, raised a strong presumption that such facts do not exist."[34] The expression has been used before and since that time. What "facts" does this presumption admit to the case across the bridge of inference? None at all. Indeed, it is compelled to suppress "facts," a wholly incon-

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[33]167 Miss. 438, 149 So. 107 (1933). Wigmore never refers to this as a presumption. See 2 WIGMORE, *op. cit. supra* note 4, at 286.

[34]167 Miss. at 453, 149 So. at 110.

gruous role for a presumption. Literally, it means that it is not invoked unless the witness knows facts. Yet, though the existence of facts justifies the presumption, the presumption automatically suppresses the facts. Aside from the building of an inference upon another inference, the pattern of this "presumption" is much like a vicious circle.

An adverse impression is a natural and proper reaction from such failure to call a witness. An inference that something is "rotten in Denmark" is rational, yet just what it is and how it got that way can not be answered by a presumption. This inference should remain available, but restricted to the judicial process of weighing equally balanced positive evidence, and to the forensic elaboration of counsel who may be "presumed" to wring from such failure the last drop of adverse inference. Its promotion to the rank of presumption was unquestionably in recognition of its accepted status as a fixed and valid test of relevancy. A party could show that his opponent either destroyed papers or bribed or suppressed his witness. When such procedures became accepted as relevant circumstances, they became "presumptions."

Our chief concern, however, is with the invasion of this "presumption" into the jury room through instructions. It would seem that the diagnostic mark of a presumption is not "may" but "must."[35] The jury may find *A* or *B*, but if it find both it must find *C*. To tell them that they may find *C* amounts to no more than a hint from the court that they should do so. They have the right to consider all evidence allowed to be submitted to them. They may draw any deductions thereupon they de-

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[35]See note 18 *supra* and reference to *Hemingway v. State*. All presumptions are assumptions. The converse is of course not true. The former are technical and compulsory; the latter are rational but open to reason and rebuttal. The presumption must divest itself of its awesome judicial regalia when it enters the jury room. Only the naked assumption, exposed to acceptance or rejection, should reach the jury. Both imply a reasonable excess of probability in favor of the existence of the *factum probandum*. 1 STARKIE, EVIDENCE (2d ed. 1834) 453. It may not be presumptuous to question this learned writer's classification of evidence, first into direct and indirect evidence (which is proper, yet involving only probative weight) and indirect evidence further into artificial presumptions and natural presumptions (*id.* at 446). In a sense, all indirect evidence is circumstantial. (See note 5 *supra* and text.) Presumptions are either natural (logical) or artificial. Yet, indirect evidence passes from mere justifiable (and optional) inference to established (and compulsory) presumption through formal adoption by the judges or legislature. A prima facie case can be made by direct or indirect evidence or by presumptions or inferences. All evidence is directed to the establishment of a fact prima facie. The nomenclature of the subject is of interest only to fix the status of the inference as optional or compulsory. Once the issue of prima facie case *vel non* has been resolved by the judge, they all resume their status as justifiable inferences and lose their identity in the mass of evidence which the jury tests upon the scales of probabilities. The presumption is the means; evidence is the end. The inability of the judge to comment on instructions upon evidence applies however adduced. It would be as logical to discuss in instructions the respective sources of all the evidence. The testimony of accomplices is unfortunately still an exception. See Alexander, *The State Also Is Entitled to a Fair Trial* (1940) 12 MISS. L. J. 265, 289.

sire. The Court alone is subject to compulsion for only rules of law control it. If there is a presumption, it must be followed. Since the presumption is destroyed by inconsistent testimony, and since only cases with inconsistent testimony are allowed to reach the jury, it is inescapable that presumptions ought never to get past the bench.

An instruction which contains the words "you may consider" or "you may infer" attests its own invalidity.[36] The jury are either 1. bound to find a verdict by peremptory instruction of the Court or 2. they are bound by no rule except their oaths.

Hobson v. McLeod.[37] Here, an instruction was declared error, which told the jury that while the defendant could not introduce the plaintiff's physician, the plaintiff could have done so and no inference unfavorable to the defendant could be drawn from his failure to introduce the physician. Its vice is apparent and it was rightly condemned. It was construed as an implication that an inference unfavorable to the plaintiff could be indulged. It is in this light that we pursue the subsequent history of this instruction. The fact that the instruction should not have mentioned presumptions or inferences was obscured by the physician-patient relationship.

Beard v. Williams.[38] The Court was chiefly concerned with the weight of the testimony. In adjusting the scales of evidence, it placed thereon "an inference of fact that where no physican is called, and many are available . . . the presumption [is] that the injured party would have called some physician had the injuries been serious." There was also placed in the balance a "presumption" that such testimony if adduced would "be against the claim of such party." Again putting aside the device of erecting one inference upon another, attention is called to the fact that the failure was not to call the physician as a witness to testify but as a physician to administer aid. The inference here is logical but it is not a presumption and is merely argumentative. Its misconception in our next case is, however, important.

Robinson v. Haydel.[39] This case was considered by another division of the Court which did not take part in *Hobson v. McLeod.* The Court now held not only in accord with *Anderson v. Cumberland Telephone & Telegraph Company, supra,* as to failure to call witnesses generally but in effect overruled the *Hobson* case by holding that the failure to call one's own physician would create the same presumption. As interesting as this

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[36]This so-called "presumption" (from failure to call witness) is defined in terms which belie its status as a presumption. 20 AM. JUR., EVIDENCE, § 187, states that "it may be inferred." See 31 C. J. S., EVIDENCE, § 156, where it is also held to "strengthen the probative force of the other party's proof."

[37]165 Miss. 853, 147 So. 778 (1933).

[38]172 Miss. 880, 161 So. 750 (1935).

[39]177 Miss. 233, 171 So. 7 (1936).

holding may be considered as an assault upon the logic and force of the *Hobson* case in upholding the physician-patient relationship, it becomes epochal in allowing such inference so designated a presumption to become embodied into an instruction to the jury. That the instruction stated such failure "may create a presumption" identifies it at once as inapt. If it may do so, the jury may do so. If they "may," they need not be told nor argued with. Moreover, the gates were thrown ajar to this rather radical departure by a key that did not fit. *Beard v. Williams, supra,* was employed to gain access to the jury room. Yet, this case not only did not involve use of the "presumption" in instructions, but, as stated, involved failure to summon any physician to aid the patient. Among the cases cited to support the decision only the *Anderson* case is in point.

Killings v. Metropolitan Life Insurance Company.[40] This case furnished an opportunity for the Court in banc to elect whether it should follow the *Hobson* or the *Robinson* case, each of which had been decided by a different division of the Court. Again, the Court was chiefly concerned with the effect, upon the privileged communications statute, of allowing comment upon the failure of a patient to call his physician as a witness. This issue seemed to obscure the question whether such comment could be imported into an instruction. In both the majority and dissenting opinions, the privileged relationship was uppermost. The majority opinions each cited the *Bunckley, Anderson* and *Quick* cases as support, none of which dealt with the use of the inference in instructions. Some hope that the decision may not close the door to a reexamination of the question is seen in the *caveat* in the concurring opinion that "care must be exercised in this regard." A loophole for future reconsideration was left by the suggestion that "there were instructions for both parties on this subject."[41]

The last occasion to examine the use of the "presumption" in instructions was *Clary v. Breyer.*[42] The Court held that plaintiff had waived the privilege accorded by the statute, and therefore the physician was available to both parties. The giving of an instruction involving a presumption adverse to plaintiff was on such ground held to be erroneous. The writer of the opinion inserted a personal view that the instruction not only exceeded the bounds allowed by the *Killings* case, but violated Section 586 of the Code of 1930.[43] If the rule in the *Killings* case survives, it will undoubtedly be due to an injection of prejudice against the inequities of the privileged communications statute.

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[40]187 Miss. 265, 192 So. 577 (1939). In an annotation in 131 A. L. R. 684, 694, the "more logical rule" is stated to be otherwise.

[41]A sound basis for exclusion of the "presumption" from instructions is found in the dissent of Smith, C. J., which invoked the inhibition of Miss. Code Ann. (1930) § 586, (Code Ann. (1942) § 1530) against comment by the judge.

[42]194 Miss. 612, 13 So. (2d) 633 (1943).

[43]Miss. Code Ann. (1942) § 1530.

There being no reason why this particular inference has a quality distinct from any other,[44] it should be admitted into or excluded from instructions according to whether inferences are ever proper material for instructions. It may be repeated that I doubt whether this inference rises to the dignity of either a "rule" or a presumption. As an inference, it is logical. If those addicted to the word "presumption" insist upon so designating it, it is not serious unless it is given extra weight over and above other recognized inferences.

The true basis for the "rule" is found in the circumstance that the evidence is peculiarly in the knowledge and control of the party affected, and in this sense it partakes of the quality of a presumption in that it places a defensive burden upon the opposing party.[45] Yet, it is a negative burden. It supplies no positive evidence. Blackstone grounds it upon the Best Evidence Rule, stating "If it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed." But what is the falsehood and what is concealed?[46] Must one presume first that there is concealment, and upon this erect a second presumption that some positive fact, *C*, exists? As a prejudicial and deteriorating factor, vague though it may be, the inference performs its logical and complete function. If it commends itself to reason, born of common judgment and experience, the jury will apply it without hint or argument from the Court. The practice of placing this mere argument in instructions violates the plain provisions of Section 1530 of the 1942 Code. Those cases are sound which deny to the inference any quality other than mere argument. Here again a safe and logical test is: if counsel is free to argue it, the Court is not. In any event, considered as presumptions, they are solely for the judges who alone have the responsibility and duty to adjudge the establishment of a prima facie case.[47]

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[44]As a matter of fact, as an inference, it is distinctive but only in that it is of much weaker force. Failure to produce documents raises no inference that they would establish any particular facts. 20 AM. JUR., EVIDENCE, § 184, at 191; 31 C. J. S., EVIDENCE, § 156, at 860.

[45]Yet, while such is the justifying basis of our Prima Facie Statute, the latter authorizes the inference, prima facie, of a definite fact, negligence. Compare the language in the *Killings* case, 187 Miss. 265, 278, 192 So. 577, 581 (1940): "This rule [*sic*] seems to be a natural operation of the human mind." If this be true, it may safely be left to the rational processes of the minds of the jurors. Under the Prima Facie Statute, the presumption supplies no evidence from the defendant's failure to adduce proof. Such failure leaves the presumptive evidence intact. So, the failure to call a witness is not evidence but a circumstance which merely reinforces the positive evidence of the opposing party. There is a distinction between a principle which makes a prima facie case and circumstances which prejudice the opponent in sustaining it. See THAYER, A PRELIMINARY TREATISE ON EVIDENCE (1898) 359.

[46]3 BL. COMM. *368.

[47]That failure to call creates no true presumption, see MCKELVEY, LAW OF EVIDENCE (4th ed. 1932) 84; 31 C. J. S., EVIDENCE, § 156, at 860. LAWSON, *op. cit. supra*, at 137, where, although called a "presumption," it is emphasized that it does not

Too little attention has been given to the distinction between presumptions, prima facie, and burden of proof. The presumption by supplying evidence makes or assists in making a prima facie case. Since the test of a prima facie case so made out is applied by the judge, he must recognize and apply an established rule. The presumption controls him alone. Whether there is a prima facie case is solely for his determination. If the case is established prima facie (by direct proof or by presumption), the burden of going forward of course shifts. Whether this burden is met is solely for the jury, unless there is no evidence adduced to meet it. To discover whether there is a prima facie case, ask the judge; to learn whether the burden of proof has been sustained, ask the jury.

The statutory inhibition against comment by the judge upon the evidence ought to apply to all evidence however produced. To treat evidence adduced by a presumption as different from that directly offered is to misconceive the nature of presumptions.[48] The device may be accepted as a means to save time or to meet practical difficulty. This merely justifies its employment but does not change the character of the inferred fact. A plaintiff may use the leverage of the prima facie statute and show negligence by 1. injury and 2. running of a train, or he may show the negligence by direct evidence. In the latter event, is there any so bold as to insist that the trial judge could properly instruct the jury that the plaintiff's evidence either shows that the defendant was negligent or that it probably does so, unless there was no rebuttal at all?

Since presumptions are effective only to make a prima facie case, and since only the judge is to decide when it is prima facie, they control only the judge. They should therefore control the case only so long as the judge can control it. If the case gets past the judge, it becomes a factual issue solely for the jury, to be resolved by usual rational processes involving logical relevancy. If a plaintiff desires to choose the easy way of a presumption, he may do so assured that the judge will accept the standardized pattern of relevancy between $(A + B)$ and C. He has thus successfully passed the judge. If the fact, C, is rebutted by defendant's evidence, plaintiff has the option of 1. resting alone upon the logical relevancy between $A + B$ and C (theretofore accepted as sufficient by the judge),

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shift the burden of proof. This ought to be a final test. See CHAMBERLAYNE, *op. cit. supra* note 13.

[48]See note 44 *supra* and accompanying text. An interesting case is *Yazoo & M. V. R. R. v. Green*, 167 Miss. 137, 147 So. 333 (1933). There were two counts, the first under the prima facie statute, the second under direct allegations of negligence. The Court stated: "As to the first count, all the facts having been shown by the evidence, that count disappears." The point to be made is this: Would there have been any less justification for an instruction under the second count that negligence could be inferred from the facts directly shown? How evidence is adduced is incidental. Wigmore states that all evidence is either positive or presumptive. 1 WIGMORE, EVIDENCE (3d ed. 1940) § 25. Academic refinements are suitable meat for judges and text writers but too heavy a diet for jurors. We repeat, when evidence reaches the jury, its only categories are weak and strong.

or 2. to adduce further proof. If *A* kill *B* with a pistol, the judge will deem sufficient the proof of *A's* intent to kill. The prosecutor may safely depend on the inference. Yet, when *A* adduces evidence rebutting an intention to kill, the prosecutor now has the alternative 1. to rest upon the logical inference from the deliberate use of a deadly weapon, or 2. to show an express purpose to kill. The logic and reason of which the so-called "presumption" is begotten remain as relevant evidence. It may be that the inference was originally delivered to the judge in a handy and convenient receptacle designated presumption. When accepted and inspected by him and found sufficient, the trappings ought to be discarded and the "facts" found therein passed on to the jury. They should not be allowed to see nor stumble over the container.[49]

Doubt regarding the use of presumptions is seen throughout our decisions. In *Colored Knights of Pythias v. Tucker,*[50] an instruction was given that if *P* was married to *C* before she married *J,* "You are bound to presume a divorce from *C.*" By holding the shifted burden too great, the Court did not examine whether the presumption would ever be proper as an instruction. In *Alabama & Vicksburg Railway v. Groome,*[51] the doctrine of *res ipsa loquitur* was defined and held to make a prima facie case.[52] An instruction was given which stated that "the law in the case presumes that the plaintiff's injury resulted from the defendant's negligence." The instruction was stated to have "given us considerable diffi-

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[49]Presumptions in criminal prosecutions will be dealt with in a succeeding article. As sustaining the textual statement, see 9 WIGMORE, *op. cit. supra* note 48, § 2491.

[50]92 Miss. 501, 46 So. 51 (1908).

[51]97 Miss. 201, 52 So. 703 (1910).

[52]The doctrine of *res ipsa loquitur* is not treated herein as a distinctive phase of the subject. It is doubted whether it is a presumption at all. Here the factors *A* and *B* in the formula are vague even as the factor *C* is indefinite in the inference from failure to call a witness. It is a mere classification by the judge of the circumstantial evidence *ad hoc* as sufficient to make a prima facie case. The mere incident that it may shift the burden of proof is an inadequate test. It is indeed not a rule by which negligence must be found but a judicial appraisal of the particular facts adduced as of sufficient weight and relevancy to justify an inference of negligence. Thus, while a presumption compels the finding of facts, the doctrine here is a creature of the particular facts. The doctrine when applied operates as does the prima facie statute. The judge who wrote the opinion in the *Groome* case later wrote that in the *Walden* case, and it is a safe assumption (not a presumption!) that he would now follow a course consistent with the latter opinion.

The doctrine merits a complete discussion but it may be summarized by a quotation from an early article found in (1831) 6 LAW MAG. 348, cited by THAYER, *op. cit. supra* note 45 at 546. "To define 'the nature and amount of the evidence which the law renders sufficient to establish a prima facie case, and throw the *onus probandi* upon the other side' is a work of great difficulty and labor. The subject is, however, one which can not be conveniently treated by itself, but the rules of which it is composed must be laid down severally under the different issues which arise in courts of law." Its standing in the society of true presumptions was depreciated in *Gulfport Creosoting Company v. White,* 171 Miss. 127, 131, 157 So. 86, 87 (1934). Its usual restriction to cases involving great danger discloses its uniqueness. If the doctrine were a true presumption, it would apply to all reasonably foreseeable and preventable dangers. See HOLMES, THE COMMON LAW (1881) 79.

culty." Yet, this was chiefly because it placed upon the defendant the burden to rebut the presumption by showing affirmatively its non-negligence. Other instances abound. The difficulties have arisen from the failure of the judges to keep presumptions to themselves. Once the judge allows them to escape from the bench, he must follow after them to seek to explain and justify their being at large and to advise beleaguered juries how to handle them without injury to themselves or the parties.

This gives rise to an examination as to when the burden, shifted by the presumption, has been met.

When The Presumptive Burden Is Met

We have seen that the statutory presumption of negligence in our prima facie statute is met when the defendant adduces enough evidence to save itself from a peremptory instruction. The duty of the defendant to show non-negligence was gradually lightened so as to involve such ambiguities as proof of "exoneration," "rebuttal," "to the satisfaction of the jury," and "tending to rebut." Later, it was defined as a duty to introduce "some evidence," and finally, to place the proof "in equilibrium." The last test[53] is met when the evidence has sufficient substance and relevancy to withstand the power of the prima facie case to compel a directed verdict. If the judge deems it sufficient (if believed) to raise an issue, the presumption is met. It can do no more.

As stated, there is no reason why evidence of negligence should have a different quality whether produced by the circumstantial evidence of a presumption or by direct evidence. Nor should the presumption stand by to escort its progeny into the jury room to vouch for it or lend it greater dignity than if it had been begotten of direct testimony.

It should be sufficient therefore to say that whether the presumption is recognized by statute or by judicial adoption, it, as such, does not have to be "met" or "rebutted." Only evidence need be rebutted.[54] Hence, what-

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[53]Learned disquisitions upon such tests, vying for originality in nomenclature, are found in Lawson, *op. cit. supra* at 578; Thayer, *op. cit. supra* note 45, at 336. The simplest rule is that a presumption is met whenever the ultimate fact inferred, *C*, would, if adduced directly, be met. If it is strong enough to withstand an adverse peremptory instruction, it is "met." This, the judge decides. Thenceforth, we repeat for emphasis, whether it is met, ask the jury. See text hereof following note 46 *supra*. Rule 704, A. L. I., Model Code of Evidence (1942), ought to settle the matter.

[54]The oft-repeated generality that "presumptions yield to facts" is a well-meant groping in the darkness, yet it stumbles in the right direction. Facts yield only to facts. It is therefore the presumed fact which must yield or survive in its clash with rebutting evidence. As an instance: A marriage, even though there was a former marriage, is presumed legal. Proof of the second marriage is enough. In a first wife's attack, she has an affirmative defensive burden to show invalidity in the second marriage. In doing so, she does not "meet" the adverse presumption, but the prima facie case which it has aided to establish. *Cf.* White v. State, 183 Miss. 351, 184 So. 303 (1938). The presumption is not a fact nor the inference. 9 Wigmore, *op. cit. supra* note 48, § 2491. In *Young v. Westphalen*, 111 Miss. 765, 72 So. 193

ever evidence is adduced by the presumption must be met in the same manner and extent that direct evidence is met. Evidence is basically classified only as weak or strong, and except where a directed verdict is indicated, its appraisal is only for the jury. The jury are not concerned with the struggle of a plaintiff to fight his way past the judge with this weapon. Once this front line is breached, plaintiff must assault the inner defenses with the forces of reason mobilized from his conscripted bits of circumstantial and direct evidence which war beneath the aegis of logic and relevancy. He may struggle as best he can to reach the haven of a prima facie case; he may "hitch-hike" part of the way upon a passing presumption. Once he reaches this battle area, however, he should be compelled to fight it out with the only weapons which persuasion allows.[55]

When the nature and function of presumptions are critically viewed, it should require no attenuation of analysis to convince open minds that all factual issues involve conflicts in evidence; that such conflicts are to be resolved in the same manner whether the evidence is adduced by direct testimony or through the labor-saving device of a presumption. Thus the simple rule that the burden of persuasion never shifts is honored not in its breach but in its simplyfying observance.[56] This should lead inescapably to the conclusion that the word "presumption" has no place in our instructions to the jury.[57]

(1916), there was involved the presumption of receipt from mailing. The Court said, "whether the rebutting evidence is sufficient to overcome the presumption is a question for the jury." Strictly, the issue was whether the rebuttal evidence impaired the circumstantial evidence of mailing below the degree of preponderance.

[55]Special treatment of presumption available to the defendant to establish an affirmative defense is avoided, as being an unnecessary subdivision of the subject. It invokes no adjustment of fundamental principles.

[56]A. L. I., MODEL CODE OF EVIDENCE (1942) Rule 704 (2): ". . . . . when the basic fact of presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action."

[57]In the *Walden* case, 160 Miss. 102, 133 So. 241 (1931), although it was held error to incorporate a presumption in an instruction, the Court said, "What form the court's instruction to the jury if any, should take in such a case is not before us, and no opinion is expressed thereon." It is suggested that the instructions need not be affected at all and should remain subject to usual principles. Sufficient recognition of the force of a presumption can be made by designation of the locus of the respective burdens of proof, or by a direction to find *C* if the jury believe *A* and *B* to be established. It is the jury's function to reason, not to reason why. See discussion in 9 WIGMORE, *op. cit. supra* note 48, § 2490. Many able writers still hold that the jury may be instructed upon the presumption when the bases, *A* and *B*, are in issue. See McCormick, *Charges on Presumptions and Burden of Proof* (1927) 5 N. C. LAW REV. 291. Yet, the compelling influence of the presumption can be retained though it remain invisible. For example, a typical instruction may be that if the jury find that *A* has been absent and unheard of for seven years, they will find that he is dead. See Note (1927) 5 N. C. LAW REV. 345.

It must be conceded that in those jurisdictions where the judge is allowed to comment upon the evidence and its weight, our protestations may fall on deaf ears. Selected authorities on this point: White v. McCullough, 56 Tex. Civ. App. 383, 120

SUMMARY

1. Presumptions are neither proof nor evidence.
2. They are solely for the use of judges.
3. Once a presumption has established evidence, prima facie, it has served its complete function and the evidence which it adduces has thereafter no quality distinct from that produced circumstantially or directly.
4. They have no place *eo nomine* in instructions, and their complete advantage is utilized when the jury are instructed as to the respective burdens of proof which they impose.
5. Their erroneous use in instructions has been due chiefly to the tendency to borrow from opinions language used *arguendo* by the Court in appraising the full weight of evidence.
6. The only possibility of an exception to their use in instructions may be found in criminal cases where the defendant offers no testimony and where, although the state has made a prima facie case, the judge is without authority to direct a verdict in its favor. It would seem, therefore, that such artificial presumptions as of intent or malice could properly be embodied in an instruction to counterweigh the arbitrary force of the so-called presumption of innocence. See *Gillespie v. State*.[58]
7. All presumptions are technical and legal. If not cast in an adopted legal mould and uniformly accepted, they become mere inferences or tests of logical relevancy. As such, they should be weighed as circumstantial evidence is weighed.

S. W. 1093 (1909); BRANSON, INSTRUCTIONS TO JURIES (2d ed. 1925) § 13; 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE (1911) 1085.

The last word, and it should remain so, is found in the comment (b) upon Rule 704 of the Model Code of Evidence: "A presumption, to be an efficient legal tool must (1) be left in the hands of the judge to administer, and not be submitted to a jury for decision of the question whether it is 'rebutted' or ceases to have compelling force; (2) be so administered that the jury never hear the word presumption used, since it carries unpredictable connotations to different minds."

[58]96 Miss. 856, 51 So. 811 (1910).

THE PURCHASE BY THE FEDERAL GOVERNMENT OF LANDS WITHIN THE STATES

*J. N. Flowers**

I

Whether a Given Transaction Effected the Transfer of Title to Land is Determined by the Law of the State Within Whose Boundaries the Land is Located.

In 1812 Justice Story said the Court "are clearly of the opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated."[1] The United States asserted title through a deed executed by a resident of the Island of Grenada. The deed did not bear a seal and was not acknowledged before a magistrate and hence did not conform to the laws of Massachusetts where the land was situate. In 1821 the Court said "It is perfectly clear, that no title to lands can be acquired or passed, unless according to the laws of the state in which they are situate."[2] That case involved title to land in Ohio depending upon an instrument executed in Virginia. In 1823 Chief Justice Marshall said "the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie."[3] That was said in a case involving a deed from Indians who claimed to own the wilderness but had no laws. In 1825 the Court said "upon general principles, there is no question that lands in Tennessee must, in all respects, be subject to the land laws of Tennessee."[4] In 1824 the Court, citing the *Crosby* case, said "It is an unquestionable principle of general law, that the title to, and the disposition of real property, must be exclusively subject to the laws of the country where it is situated."[5] Kerr relied upon a will made, so he contended, in Kentucky. The land was in Ohio. The document offered as a will did not meet the requirements of the laws of Ohio. And in 1825 the Court said "It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another."[6] The court was there dealing with the title to land in Ohio claimed under a will made in Pennsylvania.

The cases above cited deal, in the main, with modes of transfer, not with the right to convey or the right to receive. But the rule extends to every question that has to be decided to determine whether title has passed

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*Jackson, Miss.; general counsel, Gulf, Mobile and Ohio Railroad Company.
[1]United States v. Crosby, 7 Cranch 115 (U. S. 1812) .
[2]Clark v. Graham, 6 Wheat. 577 (U. S. 1821).
[3]Johnson and Graham's Lessee v. McIntosh, 8 Wheat. 543, 572 (U. S. 1823).
[4]Darby's Lessee v. Mayer, 10 Wheat. 465 (U. S. 1825).
[5]Kerr v. Moon, 9 Wheat. 565 (U. S. 1824).
[6]McCormick v. Sullivant, 10 Wheat. 192 (U. S. 1825).

from one to another. In 1870 Charles Fox died in New York leaving a will which provided that his real and personal property should go to the United States. The courts of that State held that the will was inoperative as to the real property; that the United States could not lawfully take and hold real estate in New York. The Supreme Court, affirming the New York courts, said:[7]

> "It is not pretended that the United States may not acquire and hold real property in the State, whenever such property is needed for the use of the Government in the execution of any of its powers; as, for instance, when needed for arsenals, fortifications, lighthouses, custom houses, court-houses, barracks, hospitals, or for any other of the many public purposes for which such property is used."

And further the court said:[8]

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick v. Sullivant, 10 Wheat., 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

The will of Charles Fox was executed in the State of New York where the real estate was situate; it was in proper form. The attempt to transmit the title failed because the devisee named in the testament was not qualified to receive or accept the title. Fox tried to *give* his land to the United States; the courts held that the title did not pass. The result would have been the same if Fox, while yet alive, had made a deed of gift; or if he had *sold* his land to the United States.

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[7]United States v. Fox, 94 U. S. 315, 317 (1877).
[8]94 U. S. at 318.

The New York Circuit Court of Appeals,[9] from whose judgment the United States appealed the case to the Supreme Court, had said:

> "The right of the United States to acquire and hold lands within a State, as incident to the execution of certain powers conferred upon congress by the Constitution, has been exercised from the foundation of the government, and has not been questioned or denied.
>
> "It is essential that this right should inhere in the general government. The Constitution, among other powers, vests in Congress the power to regulate commerce, to declare war, to levy and collect taxes, to establish post-offices, and to constitute inferior courts.
>
> "In executing these powers, it may take and hold lands for the erection of light-houses, forts, custom-houses, post-offices and court-houses, and this State has been ready at all times to aid the general government, by assenting to the exercise by the latter of exclusive power of legislation over lands therein acquired for these purposes."[10]

Fox stated in his will that he was giving the land to the Government "for the purpose of assisting to discharge the debt contracted by the war for the subjugation of the rebellious Confederate States."

The New York Court of Appeals had further said:[11]

> "It is a settled principle of the common law, that the lex rei sitae governs in respect to the modes of transfer of real property and the capacity to make and receive them [*sic*], and the validity of devises of lands is regulated and controlled by the local law; and the law of any other jurisdiction or sovereignty upon the subject, in opposition to the law of the place, is nugatory.
>
> "There can be no pretence that the States have surrendered to the general government control over this subject. No such claim has been asserted; and jurisdiction over testamentary dispositions of lands within a State by the general government is in no way an essential or appropriate incident to the power to take lands for public uses."

It is to be noted that the Supreme Court adopted the views and,

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[9]In the Matter of the Will of Fox, 52 N. Y. Rep. 530 (1873).

[10]The United States has been held to have authority to acquire lands for barracks, forts, arsenals, armories, navy yards, lighthouses, custom-houses, post offices, courthouses, locks and dams for the improvement of navigation, reservoirs and levees to control the waters of navigable streams, homes for disabled volunteer soldiers and other governmental purposes.

[11]52 N. Y. Rep. at 534.

to an extent, the language of the New York Court of Appeals. The *Fox* decision has been cited many times by the Supreme Court and is still relied upon. While it dealt with an attempt to devise real property to the United States the rule that controlled the decision is equally applicable to transfers *inter vivos*.

The writers of the opinions went no further than was necessary to dispose of the immediate issue. They needed only to refer to the rule that the law of the jurisdiction in which the land is located determines the effect of attempted transfers and then inquire whether there was any local law that would give validity to Fox's attempt to devise his land to the Federal Government. The rule *lex loci rei sitae* was recognized by both courts as being a rule of necessity. No state can continue its existence if it does not enforce this rule. The right of the state to say who shall own its lands and by what means title may be transferred is superior to the right of the landowner to do what he pleases with his own. It is not for the citizen or the landowner to decide to whom he shall transfer his title. He can do what he will within the law. He cannot give or sell or devise his land to one who is not authorized by the local law to receive and hold the title. To deny this superior power of the state would be to deny its power to perpetuate itself. The courts in the *Fox* case did not have occasion to explore the wider reaches of the principle. They were dealing with one small transaction, a transaction innocent in itself. The United States, as held by the Supreme Court, is subject to the rule. A state has the right to enforce its local laws against the United States just as it may enforce them against others. In the *Fox* case the United States had to submit its transaction to the law of the state where the land was located. The Congress has no authority to make rules governing the devolution of titles to lands in the states. The Congress does have the authority to give validity to the acquisition of lands within the states needed for the performance of constitutional functions.

> "The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . . . Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2."[12]

In 1924 the Supreme Court said "The general rule is not to be doubted that the tenure, transfer, control, and disposition of real property

[12]Pennoyer v. Neff, 95 U. S. 714, 722 (1878).

are matters which rest exclusively with the state where the property lies," citing *United States v. Fox.*[13]

> "A principle of law which is acquiesced in by the jurists of all civilized nations and thus part of the jus gentium is that all real or immovable property is exclusively subject to the laws of the country within which it is situated, and no interference with it by any other sovereignty can be permitted."[14]

The rule, universally approved, that the state has the exclusive power to say how and to whom titles to lands within its boundaries may be transferred, has behind it the demands of necessity. The state's territorial domain is its life, its reason for being. Every state is jealous of its boundaries; it must, at its peril, keep its land area intact. The land is not moveable; the supply of it is limited. Citizens build their homes on the land. They make their living out of it. It is a natural resource. The more land the state has for the use of citizens the greater the number of citizens it can have to support it. The state, to realize upon its potentialities as they are discovered, to preserve its chances to grow, must prevent the reduction of its domain. It has the power to defend itself against encroachments.

II

The Congress Has No Power to Suspend Or To Nullify the Land Laws of the States.

A state or a nation has the right to say who shall own its lands and how titles may be transferred from one to another. It is a rule of self-preservation. Without it we would have destructible states. The state could be destroyed by the transfer of its lands to the United States. The result is the same whether the land is taken by force or by purchase or received as a donation. The future of the state, in this regard, does not depend upon the will of landowners. The United States has no more authority to acquire lands in the State of Mississippi, say, than has the State of New York, except the power to acquire "Places" to locate establishments for the performance of governmental functions.

> "The authority of a nation within its own territory is absolute and exclusive."[15]

> "Any restriction upon this sovereignty, when such restriction comes from a foreign power, implies a transfer *pro tanto* of such sovereignty to such power."[16]

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[13]Sunderland v. United States, 266 U. S. 226, 232-233 (1924).

[14]11 Am. Jur., Conflict of Laws, § 30. See also 15 C. J. S., Conflict of Laws, § 19 (b), and Restatement, Conflict of Laws (1934) § 215, *et seq.*

[15]1 Wharton, International Law Digest (1886) 1.

[16]*Id.* at 2, citing The Schooner Exchange v. McFaddon, 7 Cranch 116 (U. S. 1812).

> "The several States which compose the Union, so far at least as regards their municipal regulations, became entitled, from the time they declared themselves independent, to all the rights and powers of sovereign States."[17]

The Congress cannot give Federal agencies authority to acquire lands in the states to be used for non-governmental purposes because it is a Government of enumerated powers and the powers not enumerated are expressly denied to the Federal Government and reserved to the states or to the people.[18] The exercise, within a state, of powers not delegated by the Constitution amounts to invasion.[19]

The exercise by Congress of power not vested by the Constitution is to exercise power that rests in the states. It is not a matter of reaching out and taking over powers nowhere vested, having no resting place; it is a matter of reaching out and taking over powers expressly reserved by and still vested in the states or the people.

Moreover, no state can, through its legislature, surrender the powers reserved to the states.[20] The Federal Government, in the manner authorized by the Congress, has the power to acquire lands for courthouses, post offices, docks, arsenals and other public purposes, whether the legislature of the state consents or not. Without this power the Federal Government could not do what it was created to do. But the Congress and the state legislature have not been delegated to make treaties or compacts for the surrender by the state of reserved power to be added to the enumeration of the powers vested by the Constitution in the United States. Power possessed by one sovereign to acquire by gift, purchase, devise or condemnation the lands within the domain of another sovereign would be power to invade and take over. It would only be a matter of financing the enterprise. It could be brought about that we would have an indestructible union of destroyed states.

The reader may ask why we call so many judicial witnesses to support an affirmation that no one denies, the affirmation being that *lex loci rei sitae* controls the devolution of land titles. The answer is that we are picturing a fortress, the state, whose power within its boundary lines is sufficient to repel peaceful aggression; the state whose power is recognized and respected by the one sovereign whose position favors screened advances. If the state may make the controlling rules, may say who shall

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[17] *Id.* at 37, citing Texas v. White, 7 Wall. 700 (U. S. 1868); Inglis v. Trustees, 3 Pet. 99 (U. S. 1830); McIlvaine v. Coxe's Lessee, 4 Cranch 209 (U. S. 1803).

[18] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. CONST. AMEND. X.

[19] United States v. Appalachian Electric Power Co., 311 U. S. 377, 428 (1940).

[20] Ashton v. Cameron Co. Water Improvement Dist. No. One, 298 U. S. 513, 531 (1936).

and who shall not take titles to its lands, then it has plenary power to keep its territory intact and its sovereignty unimpaired. Laws made on the outside do not suspend laws made or adopted on the inside. The state is a fortress protected by law of its own adoption. It is free in this regard to make its own laws. We call upon Wharton and Kent and Cooley and Story and Marshall and other Justices of the Supreme Court to prove that the state has the power to protect itself by law, and that this means of defense is available to it against all comers including the United States and its agencies.

But it may be said that we have no *lex loci* that prohibits the ownership of real estate by other sovereigns; that we have no statute prohibiting the acquisition by the Federal Government of forest lands in this State. The inquiry, at this point, is not whether we have laws prohibiting the taking over of lands by another sovereign but whether we have laws permitting it. Another sovereign cannot take over any portion of our territory without the express consent of the state; and the giving of such consent is not within the power of any state officer or agency. It is true that the consent of the state is given to acquisitions by the United States of sites for governmental establishments but provision for such consent is made in the organic law and serves, not to give legality to the transaction but to give the United States jurisdiction over the parcels of land so acquired. There is in the Constitution of the United States no provision for the taking over of the lands in a state except in instances where no consent of the state is required. Nor is there in the Constitution of Mississippi any power vested in the legislature to surrender any portion of the state's domain or sovereignty to the United States. We have by statute yielded jurisdiction over "Places" acquired by the Federal Government for use in the performance of governmental functions. But the legislature has no authority to go further. The power to surrender our territory and our sovereignty still remains with the people; the people have not authorized the legislature to accept terms or conditions of surrender. Up to date the people have not seen fit to delegate to any official or official body authority to yield to another sovereign any part of our territory or of the state's sovereignty, except to the extent that we are bound by our compact with the Federal Government to recognize its need for parcels of land and jurisdiction thereover in order to perform its supreme duties.

III

The Statutes Under Which Federal Agencies Claim to be Acquiring Lands in Mississippi and Other States for the Purpose of Growing Timber.

One of the powers vested in Congress[21] is to regulate commerce among the several states and with the Indian tribes. The power of Con-

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[21]U. S. CONST. Art. I, § 8, ¶ 3.

gress to regulate commerce has been found to include the power to deal with navigable waters: to deepen and widen channels, to remove obstructions in the streams, to build locks and dams, to decide where bridges shall be built and the nature of such structures, to take steps to increase or lessen the flow of waters and to prescribe all measures deemed necessary to insure the use of navigable waters for the benefit of the public and for the defense of the country in time of war. In the exercise of this power the Congress has gradually extended its claims of necessity into the territory along the banks of streams. And it has further developed its powers by asserting jurisdiction over nonnavigable portions of navigable streams and over nonnavigable tributaries and the branches of tributaries. So expansive has Clause 3, Section 8 of Article I become that it is not impossible to foresee that in the hands of an aggressive management in Washington, so inclined, the Clause could be used to legalize the taking over of the major portion of the territory of each state. In fact it quite clearly now appears that the ability of the state to keep its lands subject to its own laws and subject to the free use of its own citizens depends upon the attitude of the state's senators and congressmen. It is plain that the members of Congress, acting in close alliance with an ambitious Federal administration, can embarrass the state by legalizing plans of the central Government to take over the state's natural resources. We have used the word "legalizing" advisedly. It is true that the Congress can enact statutes having a dubious constitutional support but so close to the borderline as to avoid condemnation of them by the courts.[22]

In 1911 Congress passed what is known as the Weeks Act.[23] The Act undertook to authorize the Secretary of Agriculture, with the approval of the National Forest Reservation Commission (a body created by the same Act), to acquire lands on the watersheds of navigable streams. There had to be an investigation and report by the Geological Survey as to the effect that the control by the Federal Government of the lands in question would have upon the navigability of the nearby stream, this to connect the transaction with the commerce clause. Although the National Forest Reservation Commission had to approve the purchase of lands selected and submitted by the Secretary of Agriculture and was required to depend upon the showing made by the Geological Survey with respect to the improvement of navigability, still Congress wrote into the Act a condition that before the Secretary of Agriculture should accept any instrument of conveyance he should have the consent of the legislature of the state in which the land was located to the purchase by the United States on the ground that such purchase would preserve "the navigability of navigable streams."

In other words, the Congress authorized the purchase of lands by

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[22]See Flowers, *The State v. The Congressman* (1945) 6 ALA. LAW. 60.
[23]36 STAT. 961, 16 U. S. C. A. §§ 480, 513-519, 521, 552, 563 (1911).

the Secretary of Agriculture for the purpose of improving navigation; Congress did not know what land the Secretary would purchase; it required the National Forest Reservation Commission to pass upon the showing made by the Geological Survey as to the possibility of improving navigation. But still the Congress was not willing to depend upon the report made by the Geological Survey and the decision of the Commission but commanded that the Secretary of Agriculture should take no conveyance unless the legislature of the state in which the land was located should commit itself by conceding the jurisdictional fact that the control of the land in question by the Federal Government would promote the navigability of a navigable stream.

In 1924 Congress passed what is known as the Clarke-McNary Act.[24] It amended the Weeks Act in certain particulars. Under the Weeks Act the National Forest Reservation Commission could not approve the purchase of lands without a report from the Secretary of Agriculture as to its timber-growing capacity and from the Director of the Geological Survey as to the effect the control by the Government would have upon navigation. The Clarke-McNary Act undertook to authorize the National Commission to approve a purchase recommended by the Secretary of Agriculture for its timber-growing possibilities, provided only that the land was part of a watershed of a navigable stream.

Under these Acts of 1911 and 1924 the Secretary of Agriculture has purchased millions of acres. The account of what has been done and what is proposed to be done may make the citizen, as well as the lawyer, wonder what the outcome will be.[25]

Under these Acts the Secretary of Agriculture has proceeded to buy lands in this and other states. If he could not trade with the owners he employed condemnation proceedings. While our citizens and our congressmen slept, a substantial portion of the natural resources of this State has been taken over in the name of the United States by the Secretary of Agriculture. It just happens that hundreds of thousands of acres taken over are in the heart of the prospective mineral territory of the State. In no instance has the legislature of the State given its consent to an acquisition on the ground that the control of the land by the Federal Government would improve the navigability of a navigable stream; and in no instance it may be said would the control by the Federal Government of the land in question have the slightest effect upon the navigability of a navigable stream!

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[24]43 STAT. 653, 16 U. S. C. A. § 515 (1924).

[25]See the able opinion of the Hon. Greek L. Rice dated October 5, 1944, addressed to Governor Thomas L. Bailey as chairman of the State Forestry Commission.

While the state may undertake to arrest this peaceful invasion,[26] yet if the instruments of transfer executed up to date are valid it may be that the state cannot arrest the movement. If the state cannot defend itself against the aggression, then the extent to which the central government may go rests entirely in the hands of the Congress. This is true because if the acquisitions made up to this time in the State of Mississippi are valid, then there is no land in the state that cannot be taken over by the Secretary of Agriculture if he will pay the price the citizen demands or the amount that a jury in a condemnation proceeding may award.

[26]See letter of Governor Thomas L. Bailey dated November 29, 1944, addressed to the members of the Legislature and attached to the opinion of the Attorney General, note 25 *supra*.

THE PLACE OF THE JUDICIARY IN THE COMING REVOLUTION

*R. V. Fletcher**

We are told on every hand that we are on the threshold of a revolution. As one person of commanding influence in government circles has recently observed: "The war is but a step in the revolution." We may not be agreed as to the form which the revolution will assume. Mr. Henry Wallace has amiably suggested: "Those of us who realize the inevitability of revolution are anxious that it be gradual and bloodless instead of sudden and bloody." Those who are hopefully making plans for the new order are endeavoring to give it the aspect of an economic, rather than a political movement. Or, to state the matter with a little greater precision, the idea seems to be that if we can adopt an economic order that is radically different from that which has prevailed in this country for one hundred and fifty years, it will not be too difficult to alter our political framework so as to make it conform to the progressive ideal of an all-powerful state. Thus, Mr. Adolph Berle referred to a certain theory advocated by others but not by Mr. Berle which he thus stated: "The government will have to enter into direct financing of activities now supposed to be private, and a continuance of that direct financing must be inevitably that the government will ultimately control and own these activities. . . . Over a period of years the government will gradually come to own most of the productive plants of the United States."

In view of this ambitious program, thus clearly outlined, it becomes an interesting question as to how these ends are to be accomplished under our existing form of government. Obviously, the simplest and most effective method would be to convene a convention for the purpose of adopting a new Constitution, which would reframe our entire governmental structure in line with the advanced ideas of those who favor a totalitarian state. But it is not likely that this method of procedure will be adopted. Such a plan would not be in accord with the policy of making gradual changes in our way of life—changes which would avoid the shock of immediate adoption of theories of government not at present widely accepted by our people. The tactics would seem to be, rather, to take one careful step at a time.

For example, efforts are now in progress to attack the transportation industry in the courts in such a fashion as to make private operation impossible. Existing war-time controls may be continued after peace has been declared until the owners of essential industries are driven to despair.

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Under the guise of caring for the unemployed, the burden of taxation may increase to crushing proportions. There are many methods that may be adopted, all leading to the consummation of the revolutionary process.

To what extent Congress will acquiesce in such a program is, of course, debatable. Up to this time, there has been a marked tendency on the part of the national legislature to cling rather carefully to many of the ancient landmarks. It is safe to say that the group in Congress that is in agreement with those extremists who advocate a radical change in our political and economic system is in a decided minority. What subsequent elections will bring forth is anybody's guess. It is fairly safe to conclude, however, that unless the peace brings wholesale unemployment and consequent business distress, Congress will probably receive no mandate from the people for revolutionary alterations in our system of private control of business.

The question remains, however, as to how far the executive power can be exerted to accomplish these purposes, even though Congress is stubborn in its refusal to go along. In other words, can Congress be by-passed in the forward march of the revolutionary movement? It must be obvious that the answer lies in the attitude of the courts. The only effective check upon executive exercise of authority is the Supreme Court of the United States. Whether an executive order is or is not enforcible under our constitutional system is the exclusive province of the courts to decide. If an aggrieved citizen seeks to challenge the action of the executive or any of his agents, he can go nowhere except to the courts. If we can conceive of a judiciary that is in all respects amenable to the will of the Chief Executive, Congress would manifestly be helpless to check aggressive action. It is important, therefore, to look at the judiciary as it is organized and as it functions today to appraise the likelihood of that gradual but thorough revolution that has been so often and so confidently predicted.

It should be remembered that much of our law is judge-made. Although courts are constantly protesting that they have no power to legislate, yet by the very nature of the judicial function, they cannot avoid doing so. The great majority of our citizens are subject to the common law. But what is the common law? It is that great body of rules and principles, reflecting the customs of our Anglo-Saxon ancestors. But who determined what customs were valid and entitled to be recognized as a part of the common law? Obviously, this determination was made by the judges in the early history of the development of the English law. To assume that these determinations were not influenced by the political and economic philosophy of the judges is to deny that they were human beings.

It is easy to visualize a court procedure in the formative period, where an astute and strong-minded judge might very well conclude that a par-

ticular custom had not been established as authentic, if in the opinion of the magistrate, such a custom would disturb the orderly conduct of society. In America, we adopted the common law as our guide, but with the qualification that we would consider binding upon us only such portions thereof as were consistent with and applicable to the conditions under which we live. Whether a particular principle of the English common law fits into our scheme of things must be decided by the judges, unless the legislative branch has already intervened by the enactment of an appropriate statute. It is safe to say that a very large part of our American common law has been made by the courts, and in making these determinations, the courts have exercised a large measure of discretion as to what is advantageous and what is the contrary.

Chief Justice Marshall was a great legislator. He would probably, if alive, be the first to deny such a charge,[1] but he could not escape from the obligation. His great opinions establishing our system of government are many of them pure legislation. He formed a conception of the place of the Federal Government in our political system, and wrote the law to fit this conception. In Marshall's opinion, we could not flourish as a nation unless trade and commerce were free as among all the people of the United States, and so he wrote the opinion in *Gibbons v. Ogden*.[2] He saw clearly that we must have a national currency that would circulate freely and that our banking system must not be hampered by local rules, and so he wrote *McCulloch v. Maryland*,[3] with its far-reaching conclusions as to implied powers. He conceived the notion that we could not take our place among the great powers of the world unless we built on a foundation of business integrity, and that the cornerstone of such an edifice was the sacredness of contracts. And so he wrote *Fletcher v. Peck*[4] and the *Dartmouth College* case,[5] great constitutional cornerstones, upon which our whole business structure rests.

With a change in the style of popular thinking, evidenced by the election of Andrew Jackson in 1828, and the appointment of Taney as Chief Justice, there was a marked tendency away from the supremacy of Federal power and a drift toward recognition of the police power of the states as being equal, if not superior, in dignity. Mr. Justice Taney, indeed, in an effort to save the nation the horrors of civil war, went far out of his way in the *Dred Scott* case[6] to express views which were clearly non-judicial, as the judicial power had previously been understood. The effect was disastrous, and the decision, now known to have been inspired by President Buchanan, has always rested like a cloud upon the record of a great and

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[1] Bank of the United States v. Deveaux, 5 Cranch 61, 87 (U. S. 1809).
[2] 9 Wheat. 1 (U. S. 1824).
[3] 4 Wheat. 316 (U. S. 1819).
[4] 6 Cranch 87 (U. S. 1810).
[5] 4 Wheat. 518 (U. S. 1819).
[6] 19 How. 393 (U. S. 1856).

good man—truly a saintly figure, both in respect to the purity of his life and the agony of his martyrdom.

In the Reconstruction era, all of us who love the South and live by its faith and its traditions owe a debt of obligation to the Supreme Court for the limitations it put upon the Fourteenth Amendment in the *Slaughter House* cases[7] and others of like tenor.

If the Court as at present constituted undertakes to do some legislating in support of the revolution, it will not have to go far to find striking precedents, although as I shall presently point out, there is a very clear distinction between supplying the deficencies in a statute, which is within the scope of its declared purpose, and expanding it to cover a subject matter which is clearly not embraced in its terms.

To form some notion of what the public may expect from the present Court, it is necessary to bear in mind its background and the atmosphere which it breathes. It is well known that the President in 1937, exasperated by certain decisions of the Supreme Court which he considered as obstructive and reactionary, sought to replace certain of the older judges with younger men to be appointed by him. The effort failed, but the ravages of time, always a potent factor in the affairs of men, enabled the President to accomplish his purpose. Of the nine judges of the Court as now constituted, seven have been appointed by the present occupant of the White House, and another has been promoted to Chief Justice by Presidential appointment. So we have a new court, and a new order.

As I see it, no legitimate criticism can be directed against the President for the type of men selected for positions on the Court, always provided those chosen are competent men, judged by conventional standards. Of course, the President should select men learned in the law, with ample experience and possessing judicial qualities of a very high order. But no one can demand that the President select for these high duties men who are out of sympathy with the President's political or economic theories. So far as my reading goes, no President has ever done so. Certain it is that President John Adams selected Marshall with full knowledge of his passionate devotion to the principle of a strong central government. There can be no doubt that President Jackson called Taney to the Chief Justiceship after a thorough testing out of his devotion to the principles of democracy as Jackson understood and applied them. President Lincoln probably named Chase to the wool-sack, believing that he would uphold Federal action with respect to paper money as legal tender. That Chase did not go along with the Congressional intent was something which could not be anticipated. It has been commonly asserted that Mr. Justice Bradley was appointed to the bench for a specific purpose. And so it has been through all the decades of our history.

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[7] 16 Wall. 36 (U. S. 1872).

The question remains as to how the new court will react to executive action, if it should be exerted in the direction of bringing about the industrial and political revolution which has been so generally and confidently predicted. Of course, no one can speak on this subject with anything that approaches authority. And yet certain tendencies may be the subject of legitimate comment. Those tendencies can best be appraised by considering a few decisions of the new Court.

The case of *United States v. Hutcheson*[8] is illustrative of the present Court's tendencies. This was a criminal prosecution by indictment under the Sherman Act for an alleged criminal conspiracy by labor union leaders resulting in boycotts, picketing and the like. That such a prosecution would lie if the facts be established had long been settled by decisions of the Supreme Court (*United States v. Brims*).[9] It was argued, however, that the rule had been changed by the Norris-La Guardia Act.[10] But this Act had no application whatever to criminal prosecutions. It was directed against the much-discussed evil of "government by injunction." It prohibited the issuance of an injunction by a Federal court in a labor dispute. The history of the Act showed that it was passed by Congress as a restraint upon the equity power of Federal Courts, and so that persons charged with violations of the law might have the benefit of a jury trial, with the obligation upon the prosecuting authority to establish guilt beyond a reasonable doubt. But the court, speaking through Mr. Justice Frankfurter, upheld the contention of the defendants, upon grounds that must strike the average lawyer as extraordinary. The learned Justice, in his opinion extending this prohibition against injunctions to criminal prosecutions, reasons thus:[11]

> "To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the Duplex case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of

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[8] 312 U. S. 219 (1940).
[9] 272 U. S. 549 (1926).
[10] 47 STAT. 70, 29 U. S. C. A. §§ 101-115 (1932).
[11] 312 U. S. at 234.

> enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking."

Here is something to give us pause. The Court concludes that Congress, in depriving Federal courts of equity of power to grant injunctions in labor dispute cases, in effect legalized conspiracies to effect secondary boycotts, although there is not a line in the statute indicating such an intention. This decision marks a departure in judicial legislation. Previous decisions, hundreds of them, had construed statutes so as to accomplish what was considered the real intent of the law-making body. Obscure phrases had been clarified by decision, and contradictory provisions reconciled, sometimes by disregarding portions of the statute. In other cases, where the end sought to be accomplished was definitely and clearly stated, the statute was given effect, despite deficiencies in language. But here, as Mr. Justice Roberts points out in his dissenting opinion, concurred in by Chief Justice Hughes:[12]

> "By a process of construction never, as I think, heretofore indulged in this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. The doctrine now announced seems to be that an indication of a change of policy in an Act as respects one specific item in a general field of the law, covered by an earlier Act, justifies this court in spelling out an implied repeal of the whole of the earlier statute as applied to conduct of the sort here involved. I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do."

It should be stated that Mr. Justice Stone, now Chief Justice, concurred in the result, but upon grounds having no relation to the Norris-La Guardia Act. Justice Stone believed the indictment insufficient under the criminal provisions of the Sherman Act. Here is a decision that may well mark an epoch. If the Court proposes to extend a statute in this fashion to accomplish an end not stated by Congress but which the judges think Congress ought to have included for consistency's sake, there is no limit to judicial legislation. It may well happen that authority granted to the Executive by Congress to be exercised in a war emergency may be amplified by the Court so as to permit the seizure and operation of properties

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[12] *Id.* at 245.

in peace times, upon the theory that the exigencies of peace are just as serious and important as the incidents of war.

Another case which deserves attention is *United States v. Southeastern Underwriters Association et al.*,[13] decided on June 5, 1944. This celebrated case involves the question whether the Sherman Act, which deals with transactions in interstate commerce, is violated by insurance companies when they fix non-competitive rates for general application in a particular state or region. For seventy-five years, the Supreme Court had held that contracts of insurance are not commerce. This doctrine was announced first in 1869, in the case of *Paul v. Virginia*,[14] twenty-one years before the enactment of the Sherman Act. The view was reaffirmed time after time,[15] so that both before and after the passage of the Sherman Act, which does not expressly refer to insurance, the doctrine was well-established that insurance writing is not commerce. But the new Court, nevertheless, held in this decision that the insurance business is commerce and, as conducted, interstate commerce as well; that the making of insurance contracts is within the purview of the Sherman Act; and the Act as so construed is constitutional. There were vigorous dissents by three justices, including the Chief Justice, with two justices recusing themselves.

It is not within the scope of this paper to argue the pros and cons of the controversy. The case is referred to as indicating the slight respect which the Court is showing for our old friend the doctrine of *stare decisis*. This doctrine is, of course, not sacrosanct. It is not an absolute rule, by which the courts are straitjacketed. It cannot be invoked to give life to pernicious error, nor can it defeat the paramount demands of justice or sanction a violation of the decencies of civilized society, to borrow phrases from some of the decided cases. But it has been generally recognized that absent elements of manifest wrong and mischief, the rule should be observed where not to do so would disturb rights under contracts entered into on the faith of an accepted course of decision, or where to disregard the principle would disturb long-accepted business principles and practices. The familiar principle has never been more clearly or emphatically stated than by the Supreme Court itself in such a case as *United States v. Flannery*,[16] where it is said that decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons.

In passing, it may not be amiss to mention a case where the rule of *stare decisis* was departed from, upon grounds which to many of us seem sufficient. I refer to the case of *Erie Railroad Company v. Tompkins*.[17] This is the justly celebrated case in which Justice Brandeis overruled the

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[13] 64 Sup. Ct. 1162 (1944).
[14] 8 Wall. 168 (U. S. 1869).
[15] Hooper v. California, 155 U. S. 648 (1895); New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495 (1913).
[16] 268 U. S. 98 (1925).
[17] 304 U. S. 64 (1938).

long-standing rule that Federal courts, while following the construction which the State courts give to their own statutes, must decide for themselves questions of general law, and are not bound by the State courts' conclusions thereon. The doctrine thus abandoned had been in effect for nearly one hundred years, or since the decision by Justice Story rendered in 1842 in the case of *Swift v. Tyson.*[18] Recognizing the importance of assigning "cogent" reasons for departing from a rule so long-established, Mr. Justice Brandeis devotes a good part of his opinion to pointing out respects in which the rule in *Swift v. Tyson* leads to confusion, injustices and discriminations. Neither does it appear that the change in the rule would seriously disturb vested property rights, or disrupt long-established business practices.

Returning to the insurance case, not only does the majority opinion ignore accepted principles governing the doctrine of *stare decisis,* but it seems to ignore as well familiar principles governing the construction of statutes. As we have pointed out, *Paul v. Virginia* was decided in 1869, holding the writing of insurance is not commerce. So that when the Sherman Act was passed in 1890, Congress had known for twenty years that a statute relating to commerce would not embrace the activities of insurance companies. Furthermore, as pointed out in the dissent by the Chief Justice, on at least two occasions, a President of the United States had asked Congress to extend its authority over insurance, only to be denied on the ground that Congressional authority could not extend to a subject which the Supreme Court had declared not to be commerce. Furthermore, the Sherman Act has been repeatedly amended, and in the Clayton Act somewhat expanded and clarified without any reference to insurance, and that, too, within one year of the decision in the *Deer Lodge* case,[19] holding again that insurance could not be considered as commerce.

Another interesting case indicating the temper of the fresh wind that sweeps the halls of the Supreme Court is *Railroad Commission of Texas v. Pullman Co.*,[20] decided by the Court speaking through Mr. Justice Frankfurter in March, 1941. In that case, the Pullman Company and certain railroad companies assailed in a Texas Federal court the validity of a Railroad Commission order requiring the Pullman Company to employ a conductor on every train which carried a sleeping car. The order was assailed on the ground that it violated the due process and commerce clauses of the Federal Constitution and upon the additional ground that, under the state law, the Commission had no power to make such an order. This last-mentioned ground of attack had never been adjudicated by the courts of Texas. The opinion of the Supreme Court is to the effect that the District Court should not decide the case at all. It was held that the pleadings

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[18] 16 Pet. 1 (U. S. 1842).
[19] 231 U. S. 495, 510 (1913).
[20] 312 U. S. 496 (1941).

raised a serious question of state law, as to which admittedly the state court's decision would be conclusive. True, the state courts had never passed upon the question, and in such cases jurisdiction over the whole controversy being undeniably lodged in the Federal court, one would suppose that the necessity of disposing of the case somehow would require either a decision by the Federal court of the state question, or a decision on Federal grounds admittedly present in the case. But the Supreme Court held that the District Court should not have decided the case at all. It was sent back, presumably to be retained on the docket of the District Court until perchance the courts of Texas, in some future litigation, should adjudicate the point. Most of us, I suspect, have hitherto entertained the view that when a court's jurisdiction is admitted, litigants are entitled to have their legitimate controversies decided so that justice may not be denied.

I have referred to these few cases as indicative of the changed attitude of the Supreme Court toward familiar and long-recognized principles of the law. No carping criticism of the Court is intended. I am only making the point that revolutionary measures approved by the Executive may, conceivably, become effective as a result of the new spirit that seems to animate the Supreme Court, and that Congress may be powerless to obstruct the process.

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BOOK REVIEWS

OUR CIVIL LIBERTIES. By Osmond K. Fraenkel. New York: The Viking Press, 1944. Pp. 277, $3.00.

This is a popular treatment of the basic tenets of democratic government—the civil liberties of the individual citizen. The Constitution's bill of rights is a singular blend of the secularism of Montesquieu and de Toqueville, of revolutionary idealism and Reformation righteousness. Although the ideal toward which most Americans strive, it lamentably has been also the theory from which the stress of conflicting emotions has caused us to retreat. The significance of this book lies in the fact that at this time, in the midst of a war, Fraenkel has seen fit to publish a group of essays on the legal structure which protects the citizen, and to address it primarily to the public at large. He writes in a clear, interesting style of how far one's freedom extends and of how it is defended, and in doing so he reviews the great Supreme Court decisions that have interpreted the basic principles. *Our Civil Liberties* is a popular version of Zechariah Chafee's classic *Free Speech in the United States.*

Most of those who have deplored the use of the due process clause to prevent societal regulation of property interests can agree that a salutary by-product of expanded interpretation has been the Supreme Court's recent tendency to apply it to laws affecting personal rights. Fraenkel believes that the guaranties of freedom of speech and of the press are not directed so much toward assuring the individual of the right to express himself as they are toward the right of society to hear him, and he carries this idea over into his discussion of whether civil liberties should be denied to those who reject them. He answers this in the negative. The privilege is not merely for the individual's own benefit, but for the benefit of the whole community. Free discussion of public issues is essential to a free people. Yet one may recall the persecution within the past few years of the Jehovah's Witnesses sect, an intolerant but sincere group of religious zealots. In *Taylor v. Mississippi,*[1] the Supreme Court unanimously reversed the conviction of several Jehovah's Witnesses under Mississippi's war-time sedition law, which punished the distribution of literature "calculated to encourage disloyalty to the government." The Witnesses stressed the supremacy of the law of God over secular law, and one of them charged that the President should not have sent our soldiers overseas and that it was wrong to fight. Mr. Justice Owen Roberts concluded that the law was unconstitutional because it penalized the communication of opinion in the absence of a sinister purpose or a clear and present danger to the government.

It took a long time for the Supreme Court to recognize that religious freedom was part of the due process clause, guaranteed by the Fourteenth Amendment against state action. However, in 1943 the Supreme Court

[1]Taylor v. Mississippi, 319 U. S. 583 (1943).

recanted the *Gobitis* case[2] and held that children who refused to salute the flag on religious grounds could not be expelled from school for that reason.[3]

One may assume that the bill of rights has pragmatic meaning only when there is disagreement among citizens; at other times it is an academic ideal. The objective, Fraenkel believes, is not to "suppress advocacy of opinion, however hateful that opinion may be to us," but to remove those "features of our national life which produce conditions that encourage such advocacy." The rights of the individual have been particularly difficult to maintain with reference to Japanese-American citizens.[4] The elements of hate and suspicion have merged with the tenseness of war. Military and civilian techniques ran head-on in Hawaii where Judge Metzger ruled that the order of the commanding general banning habeas corpus writs was void. This was finally settled in favor of the civil government, but was played down by the newspapers. Of course the test under the Alien and Sedition Law remains the ambiguous "clear and present danger" criterion of Judge Holmes in the *Schenck* case.[5] Fraenkel, experienced in this field, confirms the observer's idea that this doctrine proves to be of little practical value in times of hysteria. The self-restraint of the people is then the test, and, with a few exceptions, it has been sustained creditably during World War II.

There is a valuable but short discussion of academic freedom. The right of the teacher to express himself freely in the classroom and out of it has developed slowly in the face of narrow political, religious, and sectarian objections. But unfortunately this ferment has found reflection in few judicial decisions, due largely to inadequacy of tenure and the often-unwarranted injecting of issues of moral standards, as in the Bertrand Russell case. Only a few American universities practice complete academic freedom. In addition to writing of the more easily delineated privileges against unreasonable searches and seizures and self-incrimination, and for trial by jury, suffrage, labor problems, and equal protection, Fraenkel discusses "some uncharted areas," including the question whether a person's freedom to express himself can properly be limited because he is employed by the government. Unfortunately these have not been explored by the courts.

The Supreme Court today is perhaps at its strongest in protecting civil liberties. The majority usually acts with what one observer has called "an uncommon feel for the jugular," a knowledge of what the case is all about, as distinguished from its legal theory. *Chambers v. Florida*[6] is not

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[2]Minersville School District v. Gobitis, 310 U. S. 586 (1940).

[3]Barnette v. West Virginia State Board of Education, 47 F. Supp. 251 (1942); *affd.* 319 U. S. 624 (1943).

[4]Hirabayashi v. United States, 320 U. S. 81, 110 (1943).

[5]Schenck v. United States, 249 U. S. 47 (1919).

[6]Chambers v. Florida, 308 U. S. 541 (1939), *granting cert.* 136 Fla. 568, 187 So. 156 (1939); *rev'd* 309 U. S. 227 (1940).

only sound law but good dialectical literature. Certainly critics of the Court should bear in mind that the much-publicized lack of unanimity among the Justices is in the American tradition: unanimity would be alarming, for it is impossible among able, well-informed and intelligent men.

WILLIAM N. ETHRIDGE, JR.*

DEMOCRACY BEGINS AT HOME: THE TENNESSEE FIGHT ON THE POLL TAX. By Jennings Perry. New York: J. B. Lippincott, 1944. Cartoons by Tom Little. Pp. 280, $3.00.

On January 18, 1945, the *Memphis Press-Scimitar* carried six distinct items on the "phantom book" whose possession, it intimated, was involved in the ousting by Ed Crump of a blind courthouse vendor from his livelihood. The book was *Democracy Begins at Home,* written in journalistic fashion as part of the crusade of the fighting editor of the *Nashville Tennessean* to eliminate the poll tax in the Volunteer State. Mr. Crump admitted that he had read "parts" of the book, and almost any part contains enough vehemence to have considerably irritated the Shelby boss. One of its main contentions is that the poll tax disfranchisement in the rest of the state ensures the "Red Snapper's" stranglehold on the commonwealth of Tennessee.

Every Mississippi lawyer and/or politician will be interested in the engrossing inside story of the monumental struggle between the Tennessee poll taxers and repealers. For hard fighting with no punches barred, for bitterness, backbiting, double crossing and double talk, for clever political maneuvering and last-ditch stands, this conflict takes us back to the heyday of the Populists. The climax seemed to come when the Tennessee legislature repealed the poll tax law, but the cries of victory were stifled by an adverse three-to-two decision of what the *Tennessean* called a Crump-packed Supreme Court. The Nashville paper says that it has just begun to fight and is now calling for a state constitutional amendment or federal action. It even suggests "that Crump one day will be gathered into a bigger ballot box than he can stuff."

Mississippi readers of the book will by no means remain on the sidelines. In fact, in this volume nothing good is said about Mississippi politics or her political leaders. But no one could fail to be interested in Mr. Perry's arguments about the poll tax, in which he contends that (1) the tax was originally imposed to circumvent the Populists, not the Negroes, (2) as a source of school revenue the tax is utterly insignificant, (3) the tax does not establish white supremacy and racism is only a black herring of emotionalism to be tied in with the outworn cry of state rights, and (4) the tax violates the federal Constitution. His comparison of the voting habits of poll tax Tennessee and non-poll tax Kentucky is par-

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*Wells, Wells and Newman, Jackson, Mississippi.

ticularly revealing. Lawyers should revel in the intricacies of the constitutional question as expressed in the Tennessee court's decision and its dissenting opinions, as well as in the larger question of interpretation of the national constitution. The answers seem clear enough to a layman. Though this exceedingly controversial book is bound to draw heavy censure from many Mississippians, others will find it logical and to the point. There is small likelihood of a similar crusade in the foreseeable future in Mississippi.

James W. Silver*

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